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No. 82-298

In the

United States Supreme Court

OCTOBER TERM 1982

THE ANACONDA COMPANY, a corporation,
on its own behalf and as successor by merger to
ANACONDA AMERICAN BRASS COMPANY,
ANACONDA WIRE AND CABLE COMPANY,
ANACONDA ALUMINUM COMPANY, and
ANACONDA ELECTRONICS COMPANY,
Appellant,

vs.

THE FRANCHISE TAX BOARD OF
THE STATE OF CALIFORNIA,
Appellee.

On Appeal from the Court of Appeal of the State of California for the First Appellate District

Motion to Dismiss or Affirm

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Appellee, pursuant to rule 16 of the Rules of the Supreme Court of the United States, hereby moves this Court to dismiss this appeal or to affirm the decision of the California Court of Appeal for the following reason:

This case does not present a substantial federal question.

INTRODUCTORY STATEMENT

Appellants the Anaconda Company and the companies with which it merged (hereafter referred to as "Anaconda") appeal the decision of the Court of Appeal of the State of California after California Supreme Court denied Anconda's petition for a hearing before it.

After analyzing the extensive Stipulation of Facts, numerous exhibits admitted into evidence and the testimony of witnesses, the California Court of Appeal concluded that the undisputed facts demonstrated as a matter of law that the activities of Anaconda and its so-called domestic subsidiaries on the one hand and of its subsidiaries operating in Chile and Mexico on the other, contributed to and/or were dependent upon each other to the extent that it was proper to treat the operations of the entire group as a unitary business for the years 1955 to 1969, the tax period in issue.

Anaconda had conceded and stipulated that it was engaged in a unitary business with all of its subsidiaries operating everywhere except its subsidiaries in Chile (Chilex and Andes) and Mexico (Cananea).[1] Included in these subsidiaries which were conceded to be unity were virtually wholly owned subsidiaries such as Anaconda Sales Company ("Anaconda Sales"), Anaconda American Brass Company ("American Brass"), Anaconda Wire and Cable Company ("Wire/Cable") and International Smelting and Refining Company ("ISARCO").

Thus, Anaconda was contesting only the combining of the activities of its subsidiaries operating in Chile and Mexico for the years 1955 through 1969, although they were fully integrated in every aspect of their operations with Anaconda.

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1. Anaconda's subsidiaries in Chile ("Chilex" and "Andes") were both United States corporations whose headquarters were in New York, and whose principal officers and directors were the same persons as the principal officers and directors of Anaconda. Anaconda's subsidiary in Mexico ("Cananea") was the wholly owned subsidiary of Greene Cananea, which was a United States corporation headquartered in New York. Greene Cananea, in turn, was wholly owned by Anaconda, and its principal officers and directors were also the same persons as the principal officers and directors of Anaconda.

SUMMARY OF ARGUMENTS

We will demonstrate that there is no substance to the arguments raised by Anaconda in its Jurisdictional Statement. Those arguments are that California has no nexus to include Anaconda's foreign operations in measuring the latter's taxable income, that the commerce clause has been violated, and that the method of apportionment is illegal.

1. In this case, California clearly has nexus to tax Anaconda on its entire worldwide operations. The evidence before the California court undeniably shows that Anaconda's Chilean and Mexican operations were unitary with the rest of its operations; the latter was conceded by Anaconda to be unitary and Anaconda paid taxes to the Franchise Tax Board on that basis.

The California Court of Appeal[2] found the presence of the following intercompany activities between Anaconda's operations which were conceded to be unitary and the operations in Chile and Mexico:

a. Significant overlap between Anaconda's board of directors and executive committee and the board of directors of the foreign subsidiaries.

b. Many Anaconda officers were also key officers of the foreign subsidiaries.

c. Board meetings of the foreign subsidiaries were held at Anaconda headquarters in New York.

d. Anaconda board was advised of Latin American operating conditions.

e. Major policy matters were subject to review by Anaconda.

f. Financial reports were submitted from the foreign subsidiaries to Anaconda.

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2. *Anaconda Company v. Franchise Tax Board* (1982) 130 Cal.App.3d. 15.

g. Intercompany sales between the Chilean and domestic operations.

h. Anaconda assisted its foreign subsidiaries in their purchasing requirements.

i. Anaconda made periodic internal audits of the records of the foreign subsidiaries.

j. Anaconda made several substantial intercompany loans to its Chilean subsidiaries.

k. Anaconda guaranteed several loans obtained by the foreign subsidiaries.

l. A common secretary-treasurer in New York handled the Chilean subsidiaries' banking transactions in the United States as well as their short term and excess fund investments.

m. Anaconda employees who were transferred to the foreign subsidiaries continued to receive their employee benefits.

n. Decisions regarding high level personnel were subject to approval by Anaconda's executive committee.

o. Certain employees of the foreign subsidiaries enjoyed same retirement and disability benefits as Anaconda's employees, and some participated in stock option plan which covered key Anaconda employees.

p. Anaconda provided engineering and geological services for the foreign subsidiaries.

q. Anaconda provided important administrative services for its foreign subsidiaries. (*Id.*, at 25-27.)

The foregoing activities amply support the Court of Appeal's decision that Anaconda was a highly integrated company whose entire existence depended upon all of its operations, both domestic and foreign. These activities unquestionably meet the tests for unity discussed by this Court in *ASARCO, Inc. v. Idaho State Tax Commission*

(1982) ..... U.S. ....., 73 L.Ed.2d 787; *F. W. Woolworth Co. v. Rev. and Tax. Dept. of New Mexico* (1982) ..... U.S. ....., 73 L.Ed.2d 819; *Exxon Corporation v. Wisconsin Department of Revenue* (1980) 447 U.S. 207 and *Mobil Oil Corp. v. Commissioner of Taxes of Vermont* (1980) 445 U.S. 425.

Thus, there is no due process question.

2. There is no commerce clause violation in this case. First, there is no double taxation under the *Japan Line test.* California's tax is on the state level and has nothing to do with the federal. Second, there was no single voice with which the federal government spoke during 1955 to 1969 regarding state taxation matters. Finally, and most importantly, Anaconda did not produce an iota of evidence that there was either double taxation or that there was a single federal voice during 1955 to 1969.

3. The Franchise Tax Board properly apportioned Anaconda's combined income pursuant to the three factor formula of property, payroll and sales. Anaconda's evidence fell far short of proving that the Franchise Tax Board's method of apportionment was erroneous. Moreover, it failed to show what should be the proper amount of the tax if the Franchise Tax Board's apportionment was erroneous. Thus, as is the case with Anaconda's preceding argument, Anaconda clearly has failed to carry the burden of proof in support of its position.

STATEMENT REGARDING THE FACTS

The factual record in this case is voluminous, consisting of a very extensive statement of fact, thousands of pages of documentary evidence and various testimonial evidence. In spite of the abundance of evidence, virtually all of which was uncontradicted, the trial court judge issued a brief, one-sentence intended decision with respect to the United States

subsidiaries operating in Chile.[3] The trial judge later did the same with respect to the Mexican subsidiary.[4] From those intended decisions, Anaconda prepared and the court signed the findings of facts which Anaconda appended to its Jurisdictional Statement as Appendix C. Anaconda has incorrectly labeled the Findings of Facts and Conclusions of Law as the "California Superior Court Opinion." In this case it is clear that the Court of Appeal repudiated in toto the so-called opinion of the California Superior Court. It is also equally clear that Anaconda failed to disclose that under well estabished California law,[5] appellate courts ignore findings of facts when the stipulated and uncontroverted facts show the trial court to be wrong. Under established California appellate practice, the appelate court then reviews the record on its own and makes its own findings of fact.

In this case Anaconda stresses only those alleged facts which support the legal conclusions that it seeks and ignores the salient undisputed facts, virtually all of which lead to the undeniable conclusion that Anaconda's operations in Chile and Mexico were not discrete from those elsewhere, but that they were unitary.

A prime example of Anaconda's conclusionary facts is found in its statement inferring that Chile and Mexico

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3. The intended decision stated as follows:
"The court intends to enter judgment in favor of plaintiff and against defendant with respect to the Chilean companies. (*Chase Brass & Copper Company v. Franchise Tax*, 10 Cal. App.3d 496.)" (CT 107.)

4. "The court intends to enter judgment in favor of Plaintiff and against Defendant with respect to the tax status of Anaconda (the Mexican subsidiary of Plaintiff), the Judgment to include interest and costs." (CT 407.)

5. *Chase Brass & Copper Co. v. Franchise Tax Board* (1970) 10 Cal.App.3d 496, 502; and *Montgomery Ward & Co. v. State Bd. of Equalization* (1969) 272 Cal.App.2d 728, 734.

extensively regulated and controlled Anaconda's operations in Latin America. (Anaconda's Jurisdictional Statement pp 5-6.) Yet early in 1956, at the beginning of the period in issue, Anaconda stated:

> "Under Law 11828 of the Government of Chile, promulgated on May 5, 1955 and the regulations thereunder issued pursuant to Presidential decree, control of sales theretofore vested in the Banco Central de Chile was terminated, and since the enactment of this law the three large copper producing companies in Chile have been entitled to receive the full proceeds of their copper, and have operated freely with respect to the sale of copper." (Def. Exhs. 9 and 10.)

Then as late as November 19, 1968, Anaconda was informing the general public, particularly in the United States, that there was no price or production control by Chile and that it believed that it was adequately protected by its agreements with the Chilean government:

> "Insofar as Anaconda's properties include assets in foreign countries and these assets contribute to its earnings, such assets and earnings may be adversely affected by the outcome of future elections and other political developments in those foreign countries, including such possibilities as production or price controls, tax changes and nationalization. The risks of such occurrences and their overall effect upon Anaconda vary from country to country and are not predictable. Although still subject to such risks, the Company believes that its investment agreements with the Government of Chile and the Copper Law in that country, referred to above, provide it with important assurances as to the status of its activities in Chile." (Def. Exh. 14, p. 13.)

We now will show conclusively that the facts actually before the California Court of Appeal not only support the

court's legal conclusions but also that there is no undecided legal issue for this Court to consider. The Court of Appeal decided that on the stipulated and undisputed facts unity was clearly shown. It also ruled, in effect, that Anaconda had failed to prove that there was a violation of the commerce clause or that the Franchise Tax Board's formula resulted in distorting Anaconda's California source income.[6]

ARGUMENT

I. Inclusion of Anaconda's Subsidiaries Operating in Latin America in the Unitary Group Is Completely Consistent With the Requirements of the Due Process Clause

A. THERE IS NO VIOLATION OF DUE PROCESS FROM THE VIEWPOINT OF NEXUS

Anaconda argues that California's unitary method as applied to Anaconda's worldwide operations violates the concept of due process in that California had no nexus to apply the unitary method to Anaconda and its Latin American subsidiaries. This due process contention in one form or another has been raised time and again by taxpayers attacking the unitary method. Anaconda's repetitious attack is no surprise.

In this case, Anaconda conceded that it was engaged in a unitary business with all of its subsidiaries except those operating in Chile and Mexico. Anaconda reported and paid taxes measured by the combined income of this group which it conceded was unitary. Included in this group were virtually wholly owned subsidiaries such as American Brass, which did business in the United States, and in Canada through its subsidiary called Anaconda American Brass Limited, Wire/Cable, and Anaconda Sales, which had sales offices

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6. The Findings of Facts (Appendix C to Anaconda's Jurisdictional Statement) show that Anaconda elected not to include any findings on these two issues, even assuming arguendo that Anaconda had presented any evidence on these matters.

throughout the world and a place of business in Chile. Also included in Anaconda's unitary group was ISARCO, its wholly owned subsidiary located in New Jersey, and whose source of business from the Chilean operations ranged from 53 percent to 74 percent during the years 1955 to 1969.[7]

Yet Anaconda seeks to exclude its Chilean operations carried on by Chilex and Andes, its United States subsidiaries. The latter were headquartered in New York and its principal officers, directors and operating personnel were in New York. Anaconda also seeks to exclude Cananea, whose stock was wholly owned by Greene Cananea, a holding company subsidiary of Anaconda; it was also headquartered in New York, along with its principal officers and directors.

The evidence presented to the trial court and later reviewed by the Court of Appeal, which found Anaconda to be engaged in a worldwide unitary business, consisted in part of the following which clearly proves unity:

1. Highly integrated executive force headed by Roy Glover, Clyde Weed, Charles Brinckerhoff and C. Jay Parkinson during the years 1955 to 1969. These four persons completely dominated Anaconda and the Latin American subsidiaries. *Not only did they occupy simultaneously the positions of president and chief executive officer of Anaconda, some of its domestic subsidiaries and the Latin American subsidiaries, they were also the chairmen of the executive committee;*

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7. Anaconda admitted that if the Chilean ore was not processed by ISARCO, the latter's operations would have been adversely affected. (Stip. Exh. "E"; Exh. 18.) Anaconda benefited from the presence of ISARCO in that it was able to produce the various copper shapes required by American Brass and Wire/Cable. (RT III, pp. 120-121.) Anaconda also benefited from ISARCO in that ISARCO had two bonded warehouses (New Jersey and Montana) so that their New Jersey copper could be substituted for Montana copper, thereby resulting in transcontinental shipping savings. (RT II, p. 307.)

2. The executive committee directed the overall operations of Anaconda and its subsidiaries on a daily basis. The executive committee was composed of five men, who were simultaneously officers and members of board of directors of Anaconda and many of its subsidiaries, including Chilex, Andes and Greene Cananea;

3. The top executives and operating personnel of Chilex, Andes and Greene Cananea were based in New York at Anaconda's headquarters (Stip. pp. 19-21; RT III, 106-107 and 110);

4. Overlapping and common directors and officers;

5. Central review and apprisement of major policy matters and Latin American operating conditions (Stip. p. 21);

6. Extensive daily, weekly and monthly reporting by the Latin American companies to Anaconda of various aspects of their operations (Stip. pp. 19-20; RT III 11-12);

7. Complete coordination of production, delivery and sales of copper ore by Anaconda Sales (Stip. pp. 22-24; RT II 267, 280-281, 283-284, 310, 218, 322 and 326);

8. Reporting in person and in writing by Anaconda Sales to Anaconda regarding the company-wide position in metals, general industry conditions, events affecting copper, etc.;

9. Extensive refining of Chilean ore by ISARCO, whose existence was dependent on the Latin American production and whose activities resulted in numerous economies for Anaconda (Stip. Exh. "E"; Def. Exh. 18; RT II 307; RT III 120-121);

10. Centralized engineering and supervision over all major construction projects worldwide (Stip. pp. 28-30; RT III 32-34);

11. Centralized geological services supervising worldwide exploration activities (Def. Exh. 42, p. 15; Def. Exh. 1; Def. Exh. 26, p. 23; Def. Exh. 37, p. 22; Def. Exh. 38, p. 15, RT III 20-21);

12. Centralized purchasing for all Latin American companies (Stip. pp. 30-31; RT III 12, 23-24, 27, and 164-166);

13. Centralized accounting and internal audit (Stip. pp. 26-27; RT III 154; RT III 157);

14. Centralized review of capital budgets and labor relations (Stip. p. 26);

15. Centralized financing including several substantial intercompany loans (Stip. pp. 27-28; Def. Exh. 14; Def. Exh. 10, p. 4);

16. Intercompany transfers of employees and officers;

17. Centralized approval of all officer promotions, salaries and retirement (Stip. p. 25; RT III 14);

18. Various centralized administrative services which amounted to over $14 million annually in charges to Chilex, Andes and Cananea (Stip. pp. 31-32);

19. Centralized research and development with the availability of extensive information and data for all of Anaconda (Def. Exh. 14, p. 16; RT III 19); and

20. Extensive intercompany sales and refining, and the availability of copper in time of domestic shortage (Stip. Exh. "C").

The foregoing elements show actual control, centralized management and integration of/and interdependency of operations. They further clearly refute Anaconda's contention that its foreign operations were discrete operations.

Anaconda then argues that because of the physical separation of Anaconda's California operations and the Latin American operations, there was no dependency between the two. But that contention is without any merit. *After all, Anaconda conceded that it was engaged in a unitary business with all its subsidiaries except those operating in Chile and Mexico.* In other words, Anaconda admitted that its California operations were dependent upon and

contributed to its operations outside of California, except for those in Chile and Mexico. Moreover, since the *Latin American* operations were clearly unitary with Anaconda's domestic operations, as evidenced by the discussion above, it logically must follow that Anaconda's California operations were a part of the entire unitary group. (*Appeal of Monsanto Company*, ¶¶ 204-430 CCH Calif. Tax Rep. (Cal. St. Bd. of Eq., Nov. 6, 1970). Also see *Xerox v. Comptroller* (Md. 1981) 428 A.2d 1208; *Albany Intl., Inc. v. Halperin* (Me. 1978) 388 A.2d 902; and *Gulf Oil Corp. v. Commissioner* (Vt. 1958) 141 A.2d 671.)

B. ASARCO AND WOOLWORTH DO NOT ASSIST OR SUPPORT ANACONDA'S POSITION BASED ON THE EVIDENCE BEFORE THE CALIFORNIA COURTS

The facts recited above unequivocably support the California Court of Appeal's finding that Anaconda was engaged in a worldwide unitary business. This finding is completely consistent with this Court's recent decisions in *ASARCO, Inc. v. Idaho State Tax Commission, supra,* ..... U.S. ....., 73 L.Ed.2d 787; *F. W. Woolworth Co. v. Rev. and Tax. Dept. of New Mexico, supra,* ..... U.S. ....., 73 L.Ed.2d 819; *Exxon Corporation v. Wisconsin Department of Revenue, supra,* 447 U.S. 207; and *Mobil Oil Corp. v. Commissioner of Taxes of Vermont, supra,* 445 U.S. 425. For example, Exxon was a vertically integrated petroleum company which explored for, produced, refined and marketed petroleum and related products. Although Exxon's activity in Wisconsin was limited to marketing, this Court sustained Wisconsin's inclusion of Exxon's income from nonmarketing activities in the United States in the apportionment formula because Exxon had not carried the burden of showing that its functional departments were discrete business enterprises.

Then in *ASARCO*, this Court approved *Exxon* and repeated that the court looks to the underlying economic realities of a unitary business. It went on to state:

> "Examining the facts, the Court found that Exxon was 'a highly integrated business which benefits from an umbrella of centralized management and controlled interaction.' " (*ASARCO, supra,* ..... U.S. ....., 73 L.Ed.2d. 797.)

Similarly, in the *Woolworth* case, this Court reiterated the now famous principle that the linchpin of apportionability for state income taxation purposes is the "unitary-business principle." The court then examined the facts and decided that Woolworth did not have a unitary relationship with its dividend paying subsidiaries because there was little functional integration, no centralized purchasing, manufacturing or warehousing of merchandise, total decentralization of management and no department or unit overseeing the foreign subsidiary operations. In the course of its decision in *Woolworth*, this Court explained that it found Woolworth not to be unitary because "there is little or no integration of the business activities or centralization of the management of these five corporations." (*Woolworth, supra,* ..... U.S. ....., 73 L.Ed.2d. 831.)

The court also pointed out that:

> "There is a critical distinction between a retail merchandising business as conducted by Woolworth and the type of multinational business—now so familiar—in which refined, processed or manufactured products (or parts thereof) may be produced in one or more countries and marketed in various countries, often worldwide. In operations of this character there is flow of international trade, often an interchange of personnel, and substantial mutual interdependence. The uncontradicted evidence demonstrates that Woolworth's international retail business is not comparable.

> There is no flow of international business. Nor is there any integration or unitary operation in the sense in which our cases consistently have used these terms." (*Id.*, at p. 832.)

However, the facts in this case indisputably prove that there was an highly integrated operation headquartered in New York where the same individuals were the chief executive officer, president and other company officers, directors and executive committee of Anaconda and the subsidiaries operating in Chile and Mexico. This centralized management staff headquartered in the same office in New York City controlled the entire Anaconda empire in virtually every aspect of their operations. The policies and directions of the entire Anaconda operations were determined in New York by the overlapping directors and officers. Anaconda's slogan of "from the mine to the consumer" truly reflected the economic realities of its operations. The California Court of Appeal correctly found this to be true.

Thus, Anaconda's reliance in *ASARCO* and *Woolworth* are ill-founded. In fact, those cases clearly support the Franchise Tax Board's position.

C. GOVERNMENT CONTROLS IN THEMSELVES DO NOT PREVENT UNITIZATION

In an effort to obfuscate the obvious fact that Anaconda was engaged in a unitary business with its subsidiaries operating in Chile and Mexico, Anaconda argues that the Chilean and Mexican government deprived it of any effective control over its subsidiaries located in those countries. This argument has no merit whatsoever.

The Court of Appeal found that government regulations by host countries in themselves do not establish that there was no unity of ownership. That court correctly found that "Up until the time of expropriation unity existed with respect to some substantial attributes of ownership, i.e., the

right to exclude other private entities from intruding upon the owned properties." (*Anaconda Company v. Franchise Tax Board, supra,* 130 Cal.App.3d 15.) This was particularly true since Anaconda owned virtually 100 percent of the Latin American subsidiaries. Finally, the evidence before the court showed that:

(a) There was no instance in which production in Chile was reduced more than production in the United States;

(b) Chilean government never forced Anaconda's subsidiaries to perform any particular or general research regarding metallurgy, etc.;

(c) Chilean government never imposed production quotas on Anaconda's subsidiaries;

(d) Chilean and Mexican governments never required Anaconda's subsidiaries to hire particular persons, either Chileans or other nationalities as officers or to appoint them to their respective boards of directors;

(e) Chilean government never forced Anaconda's subsidiaries to develop new plants, buildings, refineries, power plants or mines;

(f) There was only one known instance of any refusal by Chile to allow the export of copper; and

(g) There was no written documentation of Chilean or Mexican governmental control of such an extent as to have deprived Anaconda of any real control over its subsidiaries. In fact, every publicly disclosed documents written by Anaconda negated any such inference.

Second, government controls in Chile and Mexico were less in scope than in the United States. Government intervention and controls over the copper industry, like any other industry in the United States, are extensive and broad. For example, the United States placed severe restrictions on foreign investments (Def. Exh. 41, p. 4), strictly regu-

lated exports of copper (Def. Exh. 38, p. 7), encouraged domestic capital investments (Def. Exh. 16, p. 3), rolled back United States copper price increases (Def. Exh. 39, p. 4), negotiated directly with the Chilean government to sell copper to United States at a lower price (Def. Exh. 39, p. 4), imposed strict environmental and waste disposal regulations, etc. The United States government intervention and controls far exceeded those in effect in Chile or Mexico.

Therefore, the argument that the Chilean and Mexican governments deprived Anaconda of any real ownership control over the subsidiaries operating in those countries is without factual support.

II. Inclusion of the United States Subsidiaries Operating in Chile and United States Holding Company's Mexican Subsidiary Operating in Mexico in the Combined Report Did Not Result in Impermissible Double Taxation Under Japan Line

A. JAPAN LINE CASE INVOLVED INSTRUMENTALITIES OF COMMERCE AND NOT THE UNITARY METHOD

In arguing that the inclusion of Anaconda's subsidiaries operating in Latin America in the California tax base results in impermissible double taxation, Anaconda relies heavily on its analysis of *Japan Line, Ltd. v. County of Los Angeles* (1979) 441 U.S. 434. But *Japan Line* is clearly distinguishable and totally inapplicable here.

In *Japan Line*, this Court held that no apportioned ad valorem property tax could be levied by Los Angeles County upon containers owned, based and registered in Japan and used solely in foreign commerce, where a Japanese-American Convention was determined to require uniform treatment and in Japan such containers are taxed on their full value and United States owned containers are not taxed at all. This Court specifically stated that there was no need to decide a broad proposition of risk of double

taxation but that "The question here is a much more narrow one, this, whether instrumentalities of commerce that are owned, based and registered abroad and that are used exclusively in international commerce, may be subjected to apportioned ad valorem property taxation by a State." (441 U.S. 444.)

Therefore, in order for the *Japan Line* decision to be controlling, the tax must be (1) an ad valorem property tax on an instrument (container or vessel), (2) owned by a foreign entity, and (3) used exclusively in foreign commerce and controlled from a foreign country. This is obviously not such a case. Contrary to Anaconda's assertion, this case has no application to state income taxes. Here the State of California is taxing Anaconda, a United States corporation. Here we are concerned solely with income resulting from Anaconda's unitary business. California is not taxing vessels owned, based and registered in a foreign country used solely to carry goods in foreign commerce.

Furthermore, other countries may tax the income of Anaconda or its foreign subsidiaries but neither California, this Court, or the United States government could declare invalid a tax asserted by, for example, Chile or Mexico on the basis of Anaconda's worldwide unitary income, even though such tax would inevitably result in multiple taxation. Surely this Court did not mean to hold that the possibility of such tax would provide a constitutional protection for Anaconda from all state taxation. Thus, this Court's rationale in *Japan Line* should either be limited to ad valorem property taxes or held inapplicable to income tax cases involving unitary businesses.

Moreover, in *Mobil Oil Corp. v. Commissioner of Taxes of Vermont, supra,* 445 U.S. 425, this Court tersely distinguished the *Japan Line* case from *Mobil Oil's* situation involving the unitary principle in these words:

> "Appellant's attempted analogy between this case and *Japan Line* strikes us as forced. That case involved ad valorem property taxes assessed directly upon instrumentalities of foreign commerce. As has been noted, the factors favoring use of the allocation method in property taxation have no immediate applicability to an income tax. . . . ." (*Id.*, at p. 448.)

In the same case, this Court further strongly suggested that application of the unitary method to worldwide operations is valid in these words:

> "Second, nothing about the logic of Mobil's [double taxation argument] is limited to dividend income. The same contention could be advanced about any income arguably earned from foreign commerce. If appellant's argument were accepted, state taxing commissions would face substantial difficulties in attempting to determine what income does or does not have a foreign source." (*Id.*, at p. 447.)

B. CALIFORNIA HAS TAXED ONLY THAT INCOME WHICH IS ATTRIBUTABLE TO CALIFORNIA

In order for Anaconda's double taxation argument to have any meaning it must show that:

(1) Income attributable to another state has been taxed by California; or

(2) The same income taxed by California has already been taxed by another state.

Quite clearly Anaconda cannot prove either. Anaconda has not offered any evidence that even one other state has taxed the income that California is taxing. Second, under California's formula apportionment only income which is taxable by California pursuant to Revenue and Taxation Code section 25101 has been taxed.

Finally, the Chilean and Mexican national taxes are taxes on the federal level and not analogous to state taxes such

as that in issue here. As discussed earlier, the United States Supreme Court in *Mobil Oil* had an opportunity to negate the Vermont tax on this ground but failed to do so.

C. ALLEGED FOREIGN GOVERNMENTAL PROTESTS ARE IRRELEVANT HERE

Rather than point to any specific uniform international custom that was allegedy impaired by the Franchise Tax Board's assessment of taxes against Anaconda, the latter relies on documents dealing primarily with unitary taxation where foreign companies have no United States connection except through a United States subsidiary. Anaconda also heavily relies on the letter of March 31, 1980 by a United States government official. But none of these references by Anaconda has any relevance to this case. None of the materials referred to by Anaconda even purports to attack apportionment between an American parent such as Anaconda and its United States subsidiaries operating in a foreign country such as Chilex and Andes. Here we are concerned only about a tax on Anaconda, some of whose subsidiaries were operating in Chile and Mexico between 1955 and 1969.

There is not a shred of evidence before this Court, nor are we aware of any before any other court, to support Anaconda's claim that between 1955 and 1969, California's tax conflicted sharply with federal tax policy, affected sensitive matters of foreign relations and national sovereignty, or impaired a uniform international custom intended to prevent international double taxation of income. Moreover, it is evident that the opponents of the unitary method have rallied their commercial supporters to attack the unitary method now. Interestingly enough, none of these foreign interests spoke up against the unitary method of taxation when it was being applied by the Franchise Tax Board in the 1960's and early 1970's against plaintiffs and other

multinational corporations with foreign operations. In fact, history of political events in Chile undeniably shows that the only foreign government protests emanating from Chile were those against Anaconda's continued extraction of Chilean's principal natural resource.

Therefore, in the absence of any evidence of double taxation or any conflicts with United States foreign policies in the years 1955 to 1969, there is absolutely nothing for this Court to review or consider as far as the issues of double taxation and the *Japan Line* holdings are concerned.

III. The Franchise Tax Board Has Properly Apportioned Unitary Income to California

As its final argument, Anaconda argues that even if it is ultimately determined that Anaconda was engaged in a unitary business with its Latin American companies, the Franchise Tax Board's formula results in a distortion of Anaconda's California source income.

This contention is without foundation. The trial court stated that it will not decide the distortion issue because of its decision that Anaconda's foreign operations were not unitary with its domestic operations. However, because Anaconda had presented its entire case, including the distortion issue, before the trial court, and because the evidence presented by Anaconda on the distortion issue was through the undisputed stipulation of facts, the Court of Appeal reviewed the facts and made its decision. The Court of Appeal ruled that Anaconda's evidence did not prove that the Franchise Tax Board's formula resulted in a distortion of Anaconda's California source income.

The Court of Appeal's decision is correct beyond any dispute. Virtually all of Anaconda's evidence is found in Exhibits I, J, K, L and M to the Stipulation of Facts. Even a cursory glance at these exhibits will support the

California appellate court's finding that they do not prove that the Franchise Tax Board's computations were erroneous. Those exhibits did not show the percentage of the Chilean production that was refined in Chile, United States, Europe and elsewhere, the lower quality of the United States ore which required greater handling and, therefore, greater costs in the United States, the items included in payroll costs, the productivity differences in the countries, the composition of the property investment figures and their accounting treatment, differences in the United States and London exchange prices, etc.

In addition to the foregoing, the figures contained in the exhibits do not take into consideration Anaconda's nontangible contributions of expertise, advice, financial strength, political influence, reputation and the like.

Anaconda's entire business encompassed a variety of operations that were integrated and combined into a unitary business from the mines to the consumers. Thus, the segregation of one part of Anaconda's operations and placing it in juxtaposition with another of its parts serves no useful purpose. It is patently obvious that even if all of Anaconda's operations were conducted in the United States, there would still be differences in the property, payroll and sales percentages. In effect, Anaconda is seeking to use selected separate accounting figures to impeach the apportionment formula. This cannot be done. (*Butler Bros. v. McColgan* (1942) 315 U.S. 501, *Exxon Corp. v. Wisconsin Dept. of Revenue, supra*, 447 U.S. 207.)

The proper criteria in determining the reasonableness of the formula apportionment was stated by the California Supreme Court in *John Deere Plow Co. v. Franchise Tax Board* (1951) 38 Cal.2d 214, 244, where it said:

"Such formula has been recognized as embracing

factors sufficiently diversified to reflect 'the relative contribution of the activities in the various states to the production of the total unitary income' so as to allocate to California its just proportion of the profits earned from a unitary business. (*Butler Brothers v. McColgan*, 17 Cal.2d 664, 678 [111 P.2d 334], aff'd. 315 U.S. 501, 509 [62 S.Ct. 701, 86 L.Ed. 991].) Its fairness in the apportionment of unitary income to sources within and without the state has been declared settled (*Edison California Stores, Inc. v. McColgan, supra,* 30 Cal.2d 472, 479), consistent with 'practical administrative difficulties that necessarily arise in fixing upon a workable formula for general application.' (*El Dorado Oil Works v. McColgan,* 34 Cal.2d 731, 738 [215 P.2d 4.].)" (*Id.*, at 222.)

The same court then went on to specifically reject the contention that the formula must reflect proportional results in a particular jurisdiction for a particular taxpayer:

"In the apportionment of a unitary business the formula used must give adequate weight to the essential elements responsible for the earning of the income ... but its propriety in a given case does not require that the factors appropriately employed be equally productive in the taxing state as they are for the business as a whole. Varying conditions in the different states wherein the integrated parts of the whole business function must be expected to cause individual deviation from the national average of the factors in the formula equation, and yet the mutual dependency of the interrelated activities in furtherance of the entire business sustains the apportionment process. (*North American Cement Corp. v. Graves, supra,* 299 U.S. 517; *Ford Motor Co. v. Beauchamp,* 308 U.S. 331, 336 [60 S.Ct. 273, 84 L.Ed. 304].)" (*Id.*, at 224-225.)

The formula as applied by the Franchise Tax Board without any of the adjustments suggested by Anaconda fulfills the well established judicial requirement that "rough approximation rather than precision is sufficient." To suggest that this test is limited to domestic operations only is without logic. If a multinational business is indeed unitary, then the test set forth in *John Deere* would be equally applicable.

Anaconda argues that *Norfolk & W. R. Co. v. Tax Comm'n* (1968) 390 U.S. 317 supports its position that the "combination of domestic and international values yields" a "type of grossly distorted result." However, there is no similarity between *Norfolk* and this case. *Norfolk* involved the question of whether Missouri had properly valued railroad rolling stock on a particular day for ad valorem property tax purposes. The court rejected Missouri's method of valuation based on an "enhanced" value concept significantly different from the book or cost value. Obviously there is no such issue in this case. Furthermore, in this case Anaconda did not prove that the Franchise Tax Board's apportionment formula resulted in a grossly distorted result.

It is well established in California that the taxpayer must not only show errors in the Franchise Tax Board's apportionment, it must also prove a better method of apportionment. (*El Dorado Oil Works v. McColgan* (1955) 34 Cal.2d 731, 745.) The taxpayer must prove what should be the proper amount of the tax. (*Flying Tiger Line, Inc. v. State Board of Equalization* (1958) 157 Cal.App.2d 85, 95; *El Dorado Oil Works v. McColgan, supra,* 34 Cal.2d 741 742; *People v. Schwartz* (1947) 31 Cal.2d 59, 64.) Here Anaconda has failed in both respects.

CONCLUSION

For the foregoing reasons set forth above, we respectfully submit that this Court should dismiss the appeal or, in the alternative, affirm the decision of the California Court of Appeal.

Respectfully submitted,

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